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# United States
# Circuit Court of Appeals

For the Ninth Circuit.

MAINE NORTHWESTERN DEVELOPMENT COMPANY, a corporation,
Appellant,
vs.
NORTHWESTERN COMMERCIAL COMPANY, a corporation,
Appellee.

No. 2773

## Appellant's Brief on Motion to Dismiss the Appeal.

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## Appellant's Brief on Motion to Dismiss the Appeal.

This is a legal action to recover the amount due from appellee, defendant below, on its stock-subscription to preferred capital stock of appellant, plaintiff below, under certain assessments or calls made by plaintiff.

The pleadings which finally framed the issues on which this action was tried are:

The Amended Complaint (Record, p. 17).

The Amended Answer to the Amended Complaint (Record, p. 23).

The Reply (Record, p. 32).

This explanation is necessary because other previous pleadings are inserted in the record under the praecipes of appellee and appellant, anticipating the motion to dismiss the appeal, and the parties being desirous of showing by the record that the question raised by the motion to dismiss was raised in the court below and of further showing the opinions and rulings of the trial court on the question so raised.

On the pleadings as finally settled, the defendant's amended answer (Record, p. 23) denies the material allegations of the amended complaint (Record, p. 17), and, for a first affirmative defense, alleges in substance as set forth in defendant's opening brief at pages 3, 4, 5 and 6.

A trial was had on the issues as finally settled, resulting in a verdict and judgment in favor of defendant from which plaintiff appeals under the provisions of Act of Congress, approved March 3, 1915, ch. 90, 38

Stat. L. 956, amending Section 274b of the Judicial Code.

Defendant now moves to dismiss the appeal on the grounds:

1. That this court is without jurisdiction of this appeal.

2. That no equitable defense is interposed in defendant's answer.

## DEFENDANT'S POINTS AND AUTHORITIES.

The contention of defendant is that the defense set up in the first affirmative defense, to-wit: (1) Want of authority in the agent executing the contract on behalf of defendant; (2) timely disapproval of contract when knowledge of its execution was brought home to defendant; (3) timely notice to plaintiff of such disapproval; (4) fraud in the breach by the agent (Rosene) of the fiduciary relation existing at time of contract between agent and defendant; (5) knowledge at time of contract by plaintiff of that fraud; constitutes a legal not an equitable defense.

And in support of that contention it argues:

### I.

That if A without authority enters into a contract

on behalf of B with a third person, it does not bind B; *a fortiori,* if B seasonably repudiates the contract, it has no legal existence. "That in substance (they contend) is the case here as alleged in the first affirmative defense." (Brief, p. 7).

If that were all that was alleged in the defense, we would concede the defense a legal one amounting to a plea of *non est factum.*

II.

Defendant contends that by reason of plaintiff's alleged knowledge of the alleged fraud on defendant, at the time of contract, the contract, whether void or merely voidable, becomes a nullity upon timely repudiation (Brief, p. 9). And cites

*Mor. on Corp.,* Sec. 522;
*Cowell v. McMillan,* 177 Fed. 25;
*City of Findlay v. Pertz,* 66 Fed. 427.

to support the proposition that the defrauded principal has a right to refuse to be bound by a transaction in which its agent has an adverse interest and *City of Findlay v. Pertz, supra,* to the effect that a defense on such premises is a legal defense and not equitable.

We concede the right of a defrauded principal to repudiate a contract made by its agent having an adverse interest, but do not concede such a defense to be legal.

It is true that the case of *City of Findlay v. Pertz, supra,* was an action at law and the pleading, under the Ohio Code practice, was a petition, answer, and reply, and that the answer contained affirmative defense alleging the plaintiff had illegally and fraudulently procured one who was their secret agent and who was an agent and officer of the City of Findlay to procure for them the contract in question.

It is also the fact that the trial judge took from the jury all consideration of the defenses presented by the municipality. It does not appear from the report of the case that the question as to whether the defenses were legal or equitable, was raised; but the appellate court found error in the trial court not submitting to the jury the question of ratification of the contract and reversed the judgment.

In the cited case of *Pac. Lbr. Co. v. Moffett,* 134 Fed. 836, it appears that an effort was made by an agent to defraud his principal by causing the principal to pay the debt of another—the contract devised for this purpose was held to be fraudulent and *void,* and never took effect. All of which is good law but not to the point involved in the motion to dismiss this appeal.

III.

Defendant further contends that when plaintiff has notice of adverse interest of defendant's agent, Ro-

sene, that in itself is notice of lack of authority on part of agent to bind his principal (Brief, p. 12), and cites text writers and cases in support thereof.

But these authorities do not touch the question under consideration here: When is a defense legal and when equitable?

In *Hotel v. Bank,* 86 Fed. 742, cited, an action on a promissory note, the court held the note as a contract made with himself by an agent on behalf of his principal, to be *void* and without consideration, *ultra vires* of the corporation, which it could not ratify and had no power to estop itself from denying. The defense was a general denial, and averred that the transaction was one between its president, individually, and the Bank of which it had no knowledge and to which it never assented. No question of equitable defense was involved.

*Bank v. Munger,* 95 Fed. 87, cited, was a suit to recover from the Bank a balance of money deposited to account and has no application to the matter under discussion.

In *Chrystie v. Foster,* 61 Fed. 551, cited, a suit by a receiver of a bank to recover a deposit, it was held that unless expressly authorized to do so the president of a bank could not use the funds of the bank to pay his personal obligations; and there being no proof

of such express authority, the authorization given him by defendants was not a defense to the claim.

Neither do the other authorities cited on pages 12 and 13 of their Brief, bear on the question as to whether the fraud alleged in the first affirmative defense constitutes a legal or equitable defense.

IV.

Defendant further contends (Brief, p. 15) that *Hill v. N. P. Ry. Co.,* 113 Fed. 914, and *Standard Portland Cement Corporation v. Evans,* 205 Fed. 1, are not applicable to the defense presented in the case at bar for the reason that the subscription was never executed by defendant either understandingly (as was the case in cases cited) or otherwise; that it was executed by Rosene as a part of a general scheme entered into with the plaintiff to defraud defendant; that the fraud alleged was not a mere inducement for the company to execute the contract but a fraud inherent in the contract itself, and cites *Insurance Co. v. Bailey,* 13 Wall. 616, a suit in equity to cancel insurance policies after death of the insured, on the ground that the policies were obtained by fraudulent misrepresentation and fraudulent suppression of material facts; where the court, in affirming a dismissal of the bill, found the obligations to pay under the policies were a purely legal demand, and the remedy afforded the insurer,

perfect and complete, was their right to make a defense at law and held that when the cause of action is a "purely legal demand" and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in the federal courts.

To the same effect, *Buzard v. Houston,* 119 U. S. 347, is cited.

The case of *Insurance Co. v. Bailey* is distinguishable from the case at bar in this.

There the allegations of fraudulent misrepresentations and fraudulent suppression of material facts in securing the policies to be issued were held to be available in a legal defense.

Such representations are in the nature of warranties on the part of the insured and proof of the falsity of which would relieve the insurer of any obligation under the policy by vitiating it *ab initio;* hence such proof would be available in a defense at law.

In *Buzard v. Houston, supra,* which was a suit in equity for rescission and cancellation of an assignment of contract on the ground of fraud and for damages, the court held that the bill stated a case for which an action of deceit could be maintained at law and which would afford full, adequate and complete remedy at law.

In the recent case of *American Sign Co. v Electro, etc., Sign Co.,* 211 Fed. 196, Van Fleet, J., distinguished the cases of *George v. Tate,* 102 U. S. 564, and *Hartshorn v. Day,* 19 How. 211, both involving specialties, and where fraud as a defense was held only available in equity, and the case of *Buzard v. Houston,* 119 U. S. 347, involving a simple contract to pay money, where fraud was held available in an action at law, and maintains that the Supreme Court has not yet decided that fraud was not available as a defense in an action at law in the federal courts on a simple contract to pay money.

But he cites Judge Taft, in *Wagner v. Ins. Co.,* 90 Fed. 395, to the effect:

> Of course, cases may be conceived where the avoiding of a release may concern the rights of others not parties, or may involve the application of peculiarly equitable doctrines of confidential relations, and the like, and thus present issues which only a chancellor with his flexible procedure and careful discrimination, can properly adjust and decide. In such cases the parties can be remitted to equity.

The case at bar is one on a subscription contract where the subscriber contracts with the corporation and with the several subscribers to its stock to take and pay for the stock subscribed and the defense set up is that of a breach by the president of defendant of the

fiduciary relations between that officer and the defendant.

This brings the case within the exception to the rule announced in *Wagner v. Ins. Co., supra,* for here the avoiding the subscription concerns the rights of others not parties, and involves the application of peculiarly equitable doctrines of confidential relations and the like and thus presents issues which only the chancellor with his flexible procedure and careful discrimination can properly adjust and decide.

The U. S. Supreme Court by its decisions in *Insurance Co. v. Bailey, supra; Insurance v. Bangs,* 103 U. S. 780, and *Buzard v. Houston, supra,* has not overruled *George v. Tate,* 102 U. S. 364 or *Hartshorn v. Day,* 19 How. 211, and the rule laid down in these latter cases still controls and has been followed by inferior federal courts in similar cases, down to and including *Standard Portland Cement Corp. v. Evans, supra,* by this court.

Defendant, referring to *Hartshorn v. Day, supra,* as the leading case announcing the principles contended for by plaintiff, that "fraud in the execution of an instrument has always been admitted in a court of law, as where it has been mis-read or some fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence," would draw an analogy between an instrument so procured and where a party secretly pays or agrees to pay an agent compensation for signing the principal's name to a contract, knowing the agent has no such authority from the principal to sign such a contract.

The fraud or imposition practiced, in procuring the signature of the party to be bound, refers to misapprehension on the part of the party to be bound as

to what is signed. In the case at bar the signature was affixed by the agent on behalf of the principal with full knowledge of the contents and import of the instrument.

Further, in *Standard Portland Cement Corp. v. Evans, supra,* the corporation's assent to the execution of the notes, it was alleged by way of defense, was procured by fraud and that one of the corporation's officers in executing the notes was influenced by fraudulent motives, and yet in that case the defense was held to be an equitable one.

*Lastly,* defendant agrees (Brief, p. 19), that, if the subscription was not void *ab initio* because of lack of authority in Rosene to sign for defendant, there can be no question that the adverse interest of Rosene coupled with his relations to both corporations, made at most a voidable contract with respect to defendant and that the timely repudiation by defendant put an end to it entirely.

But as we shall discuss further on the alleged disapproval was in 1906 and the discovery of the alleged fraud is stated in the plea to have been four or five years later; and, as the alleged disapproval was not based on fraud, the tender of the issue of fraud in the plea, in addition to the allegation of disapproval, constitutes an equitable defense within the rule laid down

in *George v. State, supra,* and *Hartshorn v. Day, supra.*

## PLAINTIFF'S POINTS AND AUTHORITIES.

### I.

This first affirmative defense under consideration contains two separate and complete defenses.

(1st) Want of authority on the part of said Rosene to execute the subscription in suit on behalf of defendant; disapproval of the subscription by defendant's trustees in April, 1906, immediately upon being notified thereof; and verbal notice of such disapproval to plaintiff soon thereafter.

(2nd) Acts on the part of Rosene, occupying a fiduciary relation to defendant, in connection with the organization of plaintiff and with his execution of the subscription constituting a breach of that fiduciary relation; all of which were at all times known to plaintiff and all of which were unknown to defendant until the year 1910 or 1911.

It will be observed from the pleading that the alleged fraud was not discovered by defendant until 1910 or 1911 and therefore could not have been the basis of disapproval of the subscription by defendant's trustees in April, 1906. The alleged disapproval followed as a consequence of defendant's trustees being informed by Rosene of the subscription being made by him on be-

half of defendant and their decision to have none of it.

The issues thus tendered in the first affirmative defense are:

(1) Want of authority, disapproval, and notice of such disapproval to defendant in April, 1906, a legal defense.

(2) Breach on Rosene's part of the fiduciary relation between Rosene and defendant known to plaintiff, unknown to plaintiff until 1910 or 1911, an equitable defense.

Upon issues joined, the defendant was at liberty to introduce evidence to support both or either of the issues so tendered by it; but no act constituting a breach of Rosene's fiduciary relation could support the allegations of the legal defense because the alleged disapproval was made by defendant without knowledge of the alleged fraud according to the express allegations of this first affirmative defense; that alleged disapproval was not based on any fraudulent acts but on want of authority in Rosene and the alleged exercise of a legal right on part of defendant's trustees to determine for defendant whether or not they would invest defendant's funds in the preferred stock of plaintiff.

Any defense by defendant put forward now, based on allegations of fraud arising from a breach by Rosene of fiduciary relations existing at the time of con-

tract between Rosene and defendant, known to plaintiff, must be *in addition* to any defense based on a disapproval at or about the time of contract without knowledge of such fraud.

The affirmative defense of want of authority and disapproval serve no function additional to the general denials of the amended answer to the amended complaint; and the proof to be offered in support of the latter would be all sufficient to support the former; that defense is still the defense of *non est factum* contained in the general denials of the amended answer.

The allegations of fraud on the part of Rosene, in this first affirmative defense, in making the subscription, of knowledge of that fraud on the part of plaintiff at all times and of want of knowledge of that fraud on the part of defendant, constitutes a defense by way of confession and avoidance; confessing the subscription and seeking to avoid it on the ground of fraud not discovered until 1910 or 1911, one or two years prior to the commencement of this action.

This *confession, per se,* precludes any element of fraud entering into the execution of that instrument itself, necessary to bring it into the classification of fraud heretofore cognizable on the law side of the court; and the avoidance, acts of overreaching and improper conduct, breaches on Rosenc's part of the fiduciary re-

lations existing between Rosene and defendant, alleged to have at all times been known to plaintiff and unknown until 1910 or 1911 to defendant, brings the defense of fraud squarely within that classification heretofore cognizable only in equity.

*Simkins' A Federal Suit at Law,* p. 44.

The federal courts have heretofore made a distinction between cases where the execution of a written instrument has been obtained by trick or fraud to which the assent of the party executing it was not given intentionally and cases where the instrument has been executed intentionally and understandingly but where the mind of the party has been affected and assent secured by means of false representations and deceit; in the former cases holding the instrument void, to be disregarded where the plea in defense is *non est factum;* while in the latter cases the instrument is held to be only voidable at option of maker and effect must be given to it as a valid instrument until it is annulled by a judicial decree in a direct proceeding for the purpose.

*Hill v. N. P. Ry. Co.,* 104 Fed. 754.
*Hartshorn v. Day,* 19 How. 211;
*George v. Tate,* 102 U. S. 564;
*Ry. Co. v. Harris,* 158 U. S. 326.

This court reviewed *Hill v. N. P. Ry Co.,* in 113

Fed. 914 and found it "unnecessary to decide whether the question of fraud leading up to and inducing the execution of such instruments may be inquired into and determined in an action at law in a federal court" and affirmed the judgment on other grounds.

In *Levi v. Matthews,* 145 Fed. 152, Circuit Court of Appeals, 4th Circuit, the rule we contend for, that an allegation of fraud inducing the contract, contained in the answer, states an equitable defense, is upheld.

In *Pac. Mut. Life Ins. Co. v. Webb,* 157 Fed. 155, Circuit Court of Appeal, 8th Circuit, which was an action on a life insurance policy when the defendant company pleaded accord and satisfaction and execution of written release which plaintiff in her reply denied and sought to avoid the release on the ground that it was procured by fraud, deceit and misrepresentation of facts, the court, upon the question of what fraud was available in an action at law in a federal court to avoid a formally executed release, after reviewing *Hartshorn v. Day,* 19 How. 211; *George v. Tate,* 102 U. S. 564; *Ry Co. v. Harris,* 158 U. S. 326; *Ry. Co. v. Dashiell,* 198 U. S. 521, said (p. 157):

"The conclusion from all the cases in the Supreme Court is that the only fraud which may be availed of in an action at law to avoid a formally executed release of the claim sued on, is misrepresentation, deceit, or trickery practiced to induce the execution of a release which the signer never intended to execute and upon

which the minds of the contracting parties never met, and does not include any of those misrepresentations of fact which may be resorted to in order to persuade the claimant to agree to the release as actually made."

In *George v. Tate,* 102 U. S. 564, an action at law, error was assigned in the refusal of the court to permit evidence to be given, of fraud by the defendant in error in procuring from the plaintiffs in error the bond upon which the judgment below was recorded. The court, through Mr. Justice Swayne, said:

* * * "2. Proof of fraudulent representations by Meyers & Greene, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected. It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give."

Citing

*Hartshorn v. Day,* 17 How. 211;

*Osterhout v. Shoemaker,* 3 Hill 513;

*Belden v. Davies,* 2 Hall 433;

*Franchot v. Leach,* 5 Cow. 506.

And in *Standard Portland Cement Corp. v. Evans,* 205 Fed. 1, which was an action at law to recover on promissory notes of the corporation and in which the corporation, as defendant, filed an answer denying some of the allegations of the complaint and setting up new matter by way of an affirmative defense alleging

the execution of the notes was induced by means of a conspiracy and scheme to defraud the corporation and that there was want of legal consideration for their execution, this court said:

"In brief, the substance of the affirmative defenses is, first, that the sale of the bonds and stock and the execution of the notes therefor were fraudulently procured, and the whole transaction was the outcome of a fraudulent conspiracy between Howard, Dingee, and Bachman to foist upon plaintiff in error (the defendant corporation) worthless bonds and stocks of a corporation in which it had no interest, and for which bonds it was to pay the full par value; and second, that although the resolution of the board of directors of the plaintiff in error (the defendant corporation) authorizing the transaction was adopted by the requisite number to constitute a quorum, Dingee, owing to his personal interest adverse to the corporation, was disqualified to act as a director, and without his presence there was not a quorum.

"The matter so pleaded requires the aid of a court of equity to give it effect, and is not available as a defense in an action at law in a federal court. The facts alleged do not show that the notes were not executed by the corporation, or that the execution thereof was procured by any trick or fraud, so as to render them void, and thus present a defense that might be made under a plea of *non est factum*. They show that the notes were executed understandingly and intentionally, but that the assent of the plaintiff in error to the execution of the same was procured by fraud and deceit, and that the action of one of the officers of the plaintiff in error was influenced by fraudulent motives. These allegations, if true, present equitable defenses. The distinction between these two classes of defenses is clear and is well established by the decisions *George v.*

*Tate,* 102 U. S. 564; *Burnes v. Scott,* 117 U. S. 582; *Hill v. Northern Pac. Ry. Co.,* 113 Fed. 914; *Levi v. Matthews,* 145 Fed. 152; *Heck v. Missouri Pac. Ry. Co.,* 147 Fed. 775; *Pac. Mut. Life Ins. Co. v. Webb,* 157 Fed. 155; *Cook v. Fidelity and Deposit Co.,* 167 Fed. 95; *Union Pac. R. Co. v. Whitney,* 198 Fed. 784."

Thus, prior to March 3, 1915, the rule had become well established in the federal courts that fraud inducing contract (not touching the physical execution of the instrument itself) constituted an equitable defense not available in actions at law.

Our contention is that the subscription contract even under the allegations of the first affirmative defense was not void but only voidable and this appellee's counsel seem to concede in their Brief at page 9, adding that it becomes a nullity upon prompt and timely repudiation by the principal. And the cases cited by counsel in their Brief undoubtedly sustain that position.

This line of argument however, is beside the question.

If defendant promptly repudiated an unauthorized contract made in its behalf, no recovery could be had on that contract by the other party thereto.

The questions raised by the motion to dismiss are:

1st. Do the allegations in the first affirmative defence of fraud constitute an equitable defense?

2nd. Would knowledge by plaintiff, at the time of contract, of the fraud, change such defense from an equitable to a legal defense?

*Standard Portland Cement Corp. v. Evans, supra,* answers the first of the questions in the affirmative and the second question in the negative.

II.

The defendant, in its amended answer to the amended complaint (Record, p. 23) sets out what was not contained in its former pleadings, a *fifth* affirmative defense, wherein it alleges (Record, p. 27):

1. That plaintiff was promoted and organized by John Rosene, A. A. Housman and L. H. French and their associates, under R. S. Maine, 1904.

2. That the promoters in order to secure for themselves and others common stock of plaintiff as a bonus and gift and without payment of any money to plaintiff therefor or receipt by plaintiff of any property, services or other thing of value as a consideration for the issuance of its common stock and contrary to laws and public policy of State of Maine entered into a scheme or device to that end as follows:

Rosene and French and other associates of theirs owned certain properties in amended complaint mentioned which they agreed, with said other promoters,

to sell to plaintiff when organized, for sum of $245,000; And it was arranged and agreed by owners and promoters and by officers and directors of plaintiff (when organized) that said property should be conveyed to plaintiff and that the ostensible consideration to be stated in documents and resolutions would be $245,000 in cash and $3,750,000 par value of common stock being all of plaintiff's authorized common stock, although the real consideration would be $245,000 in money; that this cash consideration, $245,000 should be paid by plaintiff to Rosene for owners of the properties; that the $3,750,000 common stock should be issued to A. A. Housman & Co. by plaintiff and that A. A. Housman & Co. should deliver $1,250,000 to Rosene, French and A. A. Housman, as a bonus or gift to them as promoters of plaintiff; and remainder of common stock, $2,500,000, should be delivered by A. A. Housman & Co. to subscribers to preferred stock, of plaintiff, from time to time as such subscriptions were obtained and paid; which scheme or device was well known to officers and directors of plaintiff and was by their cooperation carried out and the common stock referred to in amended complaint which plaintiff avers it is ready and offers to deliver to defendant is a part of said $2,500,000 common stock so illegally issued to

A. A. Housman & Co. pursuant to said scheme and device.

3. That the common stock was issued by plaintiff to A. A. Housman & Co. and was never issued or delivered to vendors of said property.

4. That said property was of little, if any, real value and was not considered by vendors nor by plaintiff nor its officers and directors as having either actual or speculative value in excess of $245,000, cash paid therefor, and was not at any time valued by plaintiff or by its directors in good faith, in exercise of their honest judgment in excess of $245,000.

5. That directors of plaintiff, at time of issuance or authorizing issuance of said stock and purchase of said properties had been selected and were controlled by Rosene, French and Housman and acted in their interest and under their control and had no knowledge of said property or its value, and if they pretended to make any valuation of it they acted wholly under the direction and control and in interest of said promoters and exercised no independent judgment and did not in fact make any bona fide valuation of said property.

6. That plaintiff has never had under its ownership or control so as to be able to issue or cause to be

issued to defendant, in performance of subscription contract, any shares of its common stock for which the par value has been paid in money, or labor or property received, either of an actual value equal to not less than par or at a valuation not less than par made in good faith by plaintiff's directors, but that all common stock proposed and offered in said amended complaint to be issued to defendant under said subscription has been or will be illegally issued under and pursuant to said fraudulent scheme and device and for no consideration to plaintiff or else for alleged labor or property at a valuation by plaintiff's directors not fixed in good faith and known by plaintiff and its directors to be excessive or beyond any fair valuation of such labor or property.

Here we have a separate defense alleging a fraudulent scheme or device to illegally issue, without consideration, all of the authorized common stock of plaintiff, one third of which was to be delivered to Rosene and his associate promoters, as a bonus and gift, and two-thirds of which was to be held in trust for the benefit of subscribers to plaintiff's preferred stock; and that plaintiff was unable to issue or cause to be issued to defendant any shares of plaintiff's common stock in accordance with the subscription contract, which had been legally issued full paid; and that the common stock

proposed to be issued to defendant under the subscription has been or will be illegally issued under said fraudulent scheme or device, all contrary to the laws and public policy of the state of paintiff's domicile, and in fraud of preferred stockholders to be, including defendant.

Here again, under a separate defense, defendant tenders an issue of fraud constituting, under the rule in *George v. Tate, supra* and *Standard Portland Cement Corp. v. Evans, supra,* an equitable defense.

Upon this defense defendant might rely to defeat recovery, assuming its general denials did not avail it and assuming that it failed to establish by competent evidence all other affirmative defenses.

III.

The question of fraud as alleged in the amended answer to amended complaint constituting an equitable defense was previously raised in this case prior to March 3, 1915, where the amended answer to the complaint (Record, p. 3) contained similar allegations of fraud; and plaintiff moved against it by a motion to strike on the ground that such allegations constituted an equitable defense, and the trial court denying the motion to strike held that "to waive such a defense on the ground that it was a matter for equitable cognizance alone would be to make a court of law a potent agency in the accomplishment of illegal and unlawful designs."

* * * "It would indeed be a harsh system of jurisprudence that would lend any of its courts to the enforcement of contracts in violation of fiduciary relations. While the distinction between law and equity is studiously preserved in our federal system, that distinction does not go to the extent of compelling one court to enforce agreements which the other would abhor." (Record, pp. 8 and 9.)

But when to a third amended answer (Record, p. 11) containing a similar affirmative defense of fraud, plaintiff demurred on the ground that the affirmative matter was matter of purely equitable cognizance not properly pleadable in an action at law, the judge of the trial court in an opinion overruling the demurrer (Record, p. 15) said:

"I desire to refer to the language employed in the order denying a motion to strike parts of the affirmative defense, filed October 16, 1914, in which it was said that the 'matter being purely explanatory of the denials set forth in the defense and not being prejudicial.' I refer to this language for the reason that it is apparent from the argument before the bar and the language employed that some of the matters set forth in this answer in the several causes of defenses may prove to be purely matters of equitable defense, and if so, would have to be excluded upon the trial of the law action." (Record, pp. 15, 16.)

## IV.

The Act of Congress, approved March 3, 1915, (38 Stat. L. 956, ch. 90) amending Section 274b of the Judicial Code so as to permit an equitable defense

by answer, plea, or replication, in actions at law, did not change the substantive law nor the distinction between law and equity; it did change the procedure which had prevailed since the judiciary act of 1789, by permitting an equitable defense to be interposed in actions at law; and provided that review of the judgment or decree in such case should be regulated by rule of court; and provided further as follows:

"Whether such review be sought by writ of error or by appeal the appellant court shall have power to render such judgment upon the records as law and justice shall require."

The appellant's counsel in December, 1915, caused inquiry to be made of the Clerk of the Supreme Court of the United States and of the Clerk of this Court as to any rule promulgated under the act above referred to and in each case the answer was that no such rule had been promulgated.

We submit:

1. That the first and fifth affirmative defenses of defendant's amended answer to the amended complaint are equitable defenses.

2. That appellant, under the Act of March 3, 1915, *supra,* may seek a review of the judgment of the lower court by appeal.

3. That this court has jurisdiction to review on

appeal the judgment of the lower court in this action at law wherein equitable defenses were interposed in the lower court.

4. That the motion to dismiss should be denied.

Respectfully submitted,

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